No. 82-1247

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
GENERAL MOTORS CORPORATION, and
RUBBER MANUFACTURERS ASSOCIATION,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
AMERICAN LUNG ASSOCIATION OF NORTHWESTERN
OHIO, INC., and ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Despite Respondent NRDC's protestations to the contrary, the decision below raises a vital federal question—whether the Clean Air Act prohibits EPA and the states from adopting and applying a plantwide definition of "source" to industrial expansion and modification projects in nonattainment areas. At issue here are regulatory measures affecting plant construction and modification in over 30 of the 50 states. The decision below also conflicts

with two prior decisions of this Court, *Train* v. *NRDC* and *Union Electric Co.* v. *EPA*, which held that EPA *must* approve state plans demonstrating timely attainment of applicable ambient air standards and meeting the enumerated requirements of Section 110(a)(2) of the Act. Finally, the decision below raises an important, generally applicable issue of administrative law—whether an agency must produce greater factual support to justify revision of a rule than that required when adopting it.

I. The Court Below Has Decided An Important Question Of Federal Law Which Should Be Settled By This Court

The D.C. Circuit has addressed the plantwide source issue[1] in the context of three different Clean Air Act programs with confusing, contradictory results. *See* Chevron Pet. at 7-10; EPA Pet. at 21-23; AISI Pet. at 15-17. In the instant case, the court below did not even purport to decide whether the plantwide definition of "source" should, as a matter of law, be applied to new

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[1] Respondents charge (NRDC Opp. at 4, footnote 8) that AISI "mischaracterizes" the EPA plantwide definition. AISI's "characterization" of the plantwide definition or the "bubble concept" associated with it is not in error. AISI's description of the "netting" aspects of the "bubble concept" is identical to that used by the court of appeals in *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 401-402 (D.C. Cir. 1979). NRDC is confusing the "netting" of emission increases and decreases with EPA's decision to specify "significance levels" below which *de minimis* plant emission increases do not trigger new source review. NRDC's quarrel is with EPA as to whether the significance level amounts listed at page 4, footnote 9 of its Opposition are in fact insignificant. NRDC itself, at page 5, footnote 9 of its Opposition, seriously mischaracterizes EPA's regulations, however, when it erroneously states that the *de minimis* increases can occur many times at a source rather than, as is in fact the case, as a single, cumulative total over a five-year period. *See* Chevron Reply at 4, footnote 1.

source review in nonattainment areas[2] but rather held itself "constrained" to reach the final result based on two prior decisions which do not support that result. Since no other courts of appeals can address this issue[3] and because the D.C. Circuit has declined the opportunity to resolve these inconsistent results, only this Court can untangle the present morass.

Resolution of the source issue is crucial. If the decision below is not reversed, the plans of at least 31 states (over 60% of the country) for the cleanup of nonattainment areas will be overturned. *See* EPA Pet. at 13-14, 21-22. Forcing the states to adopt a "dual" definition of the term "source"[4] will delay plant replacement and modernization

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[2] NRDC consumes twelve pages of its Opposition (at 10-21) defending the decision below on the basis of the Act's legislative history. The court below, however, reviewed this history and the statutory language and concluded that neither "squarely addressed" Congress' view of "stationary source" for purposes of the Part D permit process and construction moratorium. Chev. App. at A-8. NRDC's emphasis on legislative history arguments not relied upon by the court below suggests that NRDC is not comfortable with the "bright line" test announced by that court as the basis for its decision. In fact, neither the statute nor its legislative history requires EPA to adopt a particular definition of "source" and neither precludes EPA from adopting the plantwide definition.

[3] NRDC misleadingly cites two cases, one each in the Fourth and Ninth Circuits, as having "rejected" application of the plantwide definition. NRDC Opp. at 6, footnote 10. At issue in those cases was not the scope nor even the application of the plantwide source definition, but rather the commencement date of construction of new boilers. In any event, both courts lacked jurisdiction to consider the legality of EPA's source definition, an issue left by Section 307(b) of the Clean Air Act to the exclusive purview of the D.C. Circuit.

[4] When the court below struck down the plantwide source definition, it did so by vacating, not remanding, EPA's October 14, 1981 regulations deleting the "dual" source definition which had been in

projects or, where the construction moratorium applies, can preclude modernization altogether, effectively putting the brakes on economic recovery for large industrial sectors of the economy.[5]

II. The Decision Below Conflicts With Applicable Decisions Of This Court

The decision below requires EPA to disapprove at least 31 state plans demonstrating timely attainment of applicable ambient air standards and meeting the specific requirements of Section 110(a)(2) using the the plantwide definition of source. In contending that the decision below does not conflict with this Court's decisions in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), which held that state plans meeting the above requirements *must* be approved regardless of the means chosen by the state to achieve attainment, Respondent NRDC mistakenly equates adoption of the plantwide source definition with failure to establish a Section 110(a)(2)(D) new source review program. The two are not equivalent. The plantwide definition affects only the *scope* of a new

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effect since August, 1980. In so doing, the court of appeals apparently intended to reinstate the previous "dual" definition which forced EPA and the states to define a source as a plant *and* each component thereof. *See* Small Refiner Lead Phasedown Task Force v. EPA, ___ F.2d ___, 18 ERC 1681, 1682 (D.C. Cir. 1983) (cites decision below as "implicitly assuming that EPA will return to its previous regulation defining 'source' under the Clean Air Act").

[5] As statistics cited by NRDC clearly show, virtually all major industrial development projects undertaken in nonattainment areas (590 out of 604 such projects—98%—over the five year period between 1976 and 1980) take place at existing plants rather than at wholly new sites. NRDC Opp. at 4, footnote 7.

source review program, not the *existence* of such a program.

Each of the 31 states that has adopted the plantwide definition of source was required to demonstrate to EPA that it has in place a new source review program meeting the requirements of Section 110(a)(2)(D) and Part D. Those states were able to make that showing by demonstrating that they have developed a series of emission reduction strategies designed to achieve applicable ambient standards. None of those demonstrations were dependent upon a new source review program utilizing the "dual" source definition.

III. The Decision Below Raises A Fundamental Issue Of Administrative Law—Whether An Agency Must Produce More Factual Support To Revise A Rule Than Initially To Adopt It

NRDC mischaracterizes AISI's administrative law argument at 17-19 of AISI's petition as a claim that "the lower court applied an improper standard of review when it failed to defer to EPA's reversal of position on a factual assertion . . ." NRDC Opp. at 9. NRDC misses the point entirely. Both EPA's August 7, 1980 "dual" definition of "source" and its October 14, 1981 plantwide "source" definition were based on policy considerations, not factual studies.[6] The lower court objected to what it perceived to

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[6] In its March 12, 1981 *Federal Register* proposal, EPA cited seven reasons for deleting the dual definition, one of which was the modernization disincentive factual assertion noted by NRDC. 46 Fed. Reg. 16281. In its October 14, 1981 promulgation, however, EPA itself dismissed this consideration as "speculative" (*see* AISI Petition, App. 27a) and instead cited two policy-related concerns for adopting the plantwide definition: (1) to eliminate confusion and promote regulatory simplicity by adopting the same definition of

be EPA's lack of factual support for amending the "source" definition, despite the complete absence of factual support for the original "dual" definition.[7]

AISI does not contend and has never contended that courts must "defer" to unsubstantiated "factual assertions" made by administrative agencies. AISI does contend, however, that where, as here, EPA acknowledges that its prior policy judgment was incorrect and, with a full explanation supported by extensive public comments, rationally determines that a different policy better implements Part D, deference should be accorded to the Agency. By requiring more, the court below impermissibly imposed procedural obligations on the Agency. *See Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 548 (1978).

An agency revision or rescission of policy should not be subjected to a harsher standard than that accorded the original exercise of the Agency's policy judgment. If anything, greater deference should be given to the agency's subsequent decision, which reflects accumulated knowledge and experience gained from implementing the initial decision. The heavy burden imposed by the court below prevents agencies from benefiting from their experience

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source for both the PSD and the nonattainment programs, and (2) to allow states to play their proper primary role in controlling pollution within state boundaries by giving them flexibility in developing their nonattainment area new source review programs and attainment demonstrations. AISI Petition, App. 23a-24a.

[7] In fact, EPA received public comment on the "source" definition on three separate occasions. 44 Fed. Reg. 3274 (Jan. 16, 1979), 44 Fed. Reg. 51924 (Sept. 5, 1979), and 46 Fed. Reg. 16280 (March 12, 1981). The overwhelming majority of commentators, including states, each time supported the plantwide source definition.

in administering regulations and correcting their mistakes.

IV. The Possibility That Congress Might Amend The Clean Air Act Is No Basis For Denying Review Of The Decision Below

NRDC suggests that, because the Congress may while reviewing and reauthorizing the Clean Air Act amend that Act, review by this Court is unnecessary. The principle asserted by NRDC—that parties aggrieved by a lower court decision should be denied access to this Court if the statute in question is subject to amendment—is fundamentally unsound. Any federal statute may be amended by the Congress. This possibility is pure speculation[8] and provides no basis for precluding aggrieved parties from obtaining redress from this Court.

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[8] The fact that the Congress is considering amendments to the Clean Air Act is no guarantee that such amendments will be enacted or that any amendments which may be enacted will include a definition of "source" specifically applicable to the nonattainment program. The Clean Air Act has been up for reauthorization the last two sessions of Congress and no new legislation has resulted from either session.

CONCLUSION

For the foregoing reasons, in addition to those stated in the original petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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